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8

9 **IN THE SUPREME COURT**
10 **OF THE STATE OF ARIZONA**

11 In the Matter of :

Supreme Court No. R-_____

12 PETITION TO AMEND
13 RULES 46-74, ARIZONA RULES
14 OF THE SUPREME COURT

SUPPLEMENTAL COMMENTS
TO AMENDED PETITION OF
DISCIPLINARY TASKFORCE
PETITION TO AMEND RULES
46-74, RULES OF THE
SUPREME COURT

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18 Pursuant to Rule 28, Ariz.R.Sup.Ct., the undersigned attorneys
19 provide the following additional Supplemental Comments to the above-
20 referenced Petition. These comments supplement or modify the Comments
21 contained in the Comments on the Taskforce Amended Petition submitted by
22 some of the undersigned respondents' counsel on June 11, 2010.

23 **Proposed Rule 55(c)(2):** In comments submitted on June 11, 2010,
24 undersigned counsel objected to the proposal that bar counsel be given the
25 authority to offer diversion “ . . . if the State Bar and respondent agree that
26 diversion will be useful.” The basis for that objection was, in essence, that it
27 would give bar counsel the authority to offer diversion even when the facts
28 would not support a violation of an ethical rule. While we continue to object

1 to the proposed additional language, we are concerned that unless bar
2 counsel are given the authority to offer diversion during the initial intake
3 process – *usually before anyone can assess with certainty whether a*
4 *violation can be proved by clear and convincing evidence* – it will be
5 difficult to achieve the goal of early disposition in many cases in which the
6 evidence of ethical misconduct is tenuous at best. We remain concerned that
7 the proposed rule gives bar counsel the opportunity to misuse the diversion
8 option but on balance, believe the risks inherent in giving bar counsel that
9 authority are outweighed by enhancing the goal of early disposition -- before
10 respondents are forced to incur the emotional and financial costs of a full-
11 scale screening investigation and formal proceeding.

12 Accordingly, we propose the following modification of Rule 55(c)(2)
13 rather than the language proposed by the Taskforce:

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15 “ . . . diversion can be offered when, upon a good faith belief by
16 bar counsel, and after review by and with approval of Chief Bar
17 Counsel, it reliably appears that an ethical violation has
18 occurred”

19 **Proposed Rule 70(a):** This rule governs public access to information
20 in the discipline system. Significantly, the rule does not distinguish between
21 reports and recommendation and agreements for discipline that are not final
22 and final Orders of discipline from which no appeal by the respondent has
23 been taken. The failure to make this distinction in the rule governing public
24 access to discipline information affects respondents unfairly and in tangible
25 and significant ways. Based on our experience, it is entirely reasonable to
26 believe that the public generally will not understand the difference between
27 the report and recommendation of a hearing panel and a final disposition
28 imposed by the Court or by the respondent’s decision not to appeal the order

1 of a panel, the PDF or the Court.¹ Undersigned counsel are aware of
2 situations in which hearing officer and Commission recommendations were
3 widely publicized and resulted in members of the public, including clients,
4 believed that the respondents had in fact been disciplined in accordance with
5 the recommendation. This misconception was widely-held despite the fact
6 that the recommendation was not final and was subject to review by the
7 Disciplinary Commission and/or this Court. As is readily understandable,
8 the financial and reputational impact resulting from this unjustified
9 misconception had a devastating effect on these respondents.

10 Accordingly, we urge the Court to add language to proposed Rule
11 70(a) which precludes the State Bar from publicizing discipline until it
12 becomes final or the time has expired for any appeal from an Order imposing
13 discipline. We realize that this prohibition will not preclude the commercial
14 media from obtaining interim Orders proposing discipline but the limitation
15 proposed by the undersigned respondents' counsel will at least inhibit the
16 State Bar from improperly exacerbating the misconception that proposed
17 discipline is final and in addition, send a message to media that reports and
18 recommendations are not final unless imposed by Order of an entity with the
19 authority to impose discipline and have not been appealed by the respondent.

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27 ¹ This assumption is based on the experience of the undersigned with the
28 current system – the public does not distinguish between reports and
recommendations of hearing officers or the Disciplinary Commission and final,
unappealed Orders or Orders imposed by this Court.

1 Accordingly, we urge the Court to adopt amendments to Rule 70(a)
2 consistent with these supplemental Comments.

3 Respectfully submitted this 18th day of June, 2010.

4
5 /s/ Mark I. Harrison

6 Ralph Adams

7 Karen Clark

8 Nancy A. Greenlee

9 Mark I. Harrison

10 Denise M. Quinterri

11 Mark D. Rubin

12 Donald Wilson, Jr.

13 Electronic copy filed with the
14 Clerk of the Supreme Court of Arizona
15 this 18th day of June, 2010.

16 By: /s/ Joni J. Jarrett-Mason

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